No. 12,964

IN THE

United States Court of Appeals

For the Ninth Circuit

C-O-Two Fire Equipment Co. and Maynard A. Laswell,

Appellants,

vs.

United States of America,

Appellee.

PETITION FOR REHEARING.

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PETITION FOR REHEARING.

Most earnestly we ask this court for a rehearing. Most earnestly we urge that the court has misconceived our position and that the result is a grave miscarriage of justice.

Were this not a criminal case our plea of failure to make our position clear might merit less consideration. But in a criminal case we believe that we are not only warranted, but under obligation, to ask this court again to consider our true position. In this regard we note that the court said in its opinion (p. 3):[1]

> "* * * it might be said that this is a close case and from a consideration of all of the facts before him he

[1]Page references are to the printed opinion from the clerk's office of this court.

> [the trial judge] might have reached a different conclusion * * *."

And the court also pointed out (p. 3):

> "All parties to this appeal agree that, substantially, none of the evidence produced at the trial was disputed. Most of the facts were either stipulated or admitted."

Thus the case presents purely a question of law.

In a most basic sense this court has misconceived our position. We do not

> "* * * assert that the absence of direct evidence of a prearranged plan among the alleged conspirators is fatal to the prosecution" (p. 11).

Nor is it true that we make

> "Much * * * of the dearth of direct evidence of conspiracy" (p. 5).

Nor do we contend that in the application of the rule with respect to circumstantial evidence the

> "* * * rule must be separately applied to each link in the chain of circumstances and if one such unit does not fit the standard then the whole is likewise vulnerable" (p. 8).

On the contrary, we concur completely in the court's statement that conviction of a criminal conspiracy under the Sherman Act may be based upon circumstantial evidence, and that the circumstances must be viewed and considered together to determine whether from the course of conduct disclosed the only reasonable inference is that of guilt.

But we do assert that proof of a number of circumstances wholly innocent in themselves, and *all of which can reasonably coexist in a state of innocence,* cannot furnish the basis for conviction of crime.

From an analysis of this court's opinion, appellants understand that the court considers that each of the circumstances in this case, considered alone, is at least equivocal; each is consistent with either lack of conspiracy (innocence) or conspiracy (guilt). But it adopted the Government's theory that, when all the circumstances were considered together, guilt was established to a moral certainty and beyond every reasonable doubt.

On this petition for rehearing we earnestly ask the court to reconsider this holding. We submit that each of the circumstances mentioned by the court is a manifestation of, and consistent with, a competitive market in which no conspiracy exists, and that *all* of them reasonably can be expected to coexist in such a market and in the absence of a conspiracy.

In presenting this petition and in urging the point just stated we do not base our plea upon hypertechnical questions of logic and inference. We ask instead that the court consider and weigh carefully the plight of these appellants as businessmen. Mr. Allen, president of C-O-Two, and Mr. Laswell, each a respected member of the business community, took the stand and denied any participation in any combination or conspiracy with their competitors. This sworn testimony is now disregarded and labeled as false because of proof of a series of business actions which were taken by appellants over the course

of many years. Appellants, of course, admit these actions —they were openly taken in the normal course of carrying on their business. Appellants appeal to the court's recognition that all these activities could reasonably have been undertaken without any agreement or understanding with competitors.

The basis upon which this court affirmed the judgment of the court below, as we understand it, is this: The evidence shows that the defendants have charged identical prices for many years, dating back to and including the time when the prices were openly agreed upon as part of licensing agreements; this fact, together with other activities characterized as "plus factors," demonstrates to the point of certainty that the price-fixing agreements of the licenses were never abrogated and that prices throughout the many succeeding years have continued, in the same pattern, to be fixed by agreement.

We submit that the facts in this record do not permit this conclusion. We submit that the record incontrovertibly establishes that the price-fixing provisions of the license agreements were abrogated in 1942 and were never re-established.

We submit that the other activities of appellants relied upon by the Government and the court were and are entirely consistent with and to be expected in a competitive market, and that appellants have been convicted of crime on the basis of conduct which is wholly innocent and which is to be expected in the normal conduct of competitive business.

1. PRICING PRACTICES SINCE THE ABROGATION OF THE PRICE-FIXING PROVISIONS OF THE LICENSE AGREEMENTS.

In respect of the pricing practices since the abrogation of the price-fixing provisions of the license agreements—and this is the single dominant fact to which the court adds all its other "plus factors"—the court has misconceived the facts. In its opinion this court says (p. 12):

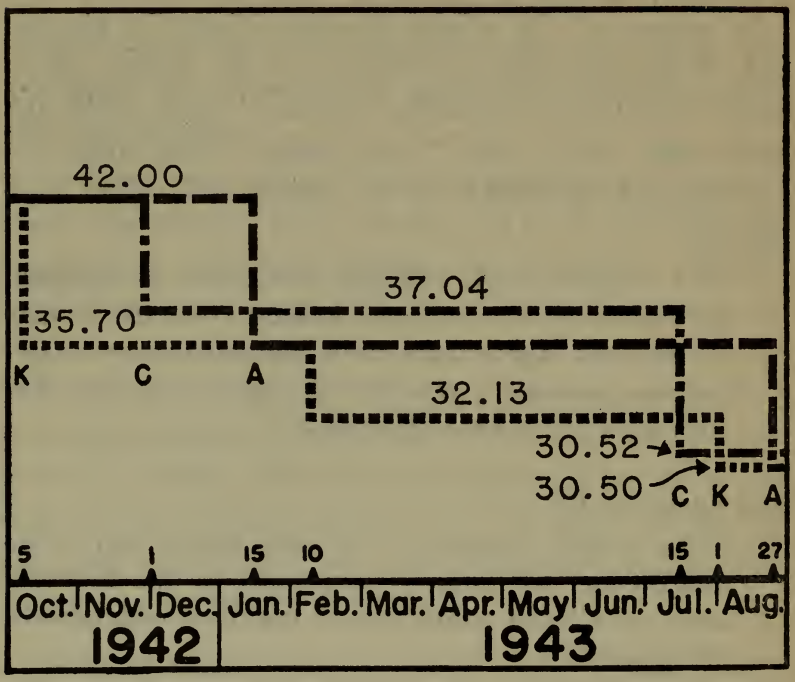
> "* * * nor was any evidence introduced to dissipate the inference of conspiracy arising from the history of licensing agreements with minimum price maintenance provisions, save for the bare statement that such provisions were abrogated."

And again (p. 6):

> "The record, however, does not reveal any price competition, as might be expected, in the industry after the alleged abrogation of the price maintenance provision."

The facts of record do not support these statements. We do not know how American businessmen more conclusively could support the good faith and complete honesty of their statements that the price-fixing provisions of the license agreements in fact were terminated than by pointing to what the price lists introduced by the Government itself in this case show. Without reproducing the full price chart attached to our reply brief we print below (with the actual prices added) that section of the chart showing the pricing picture of the 10-pound model (the model selected by the Government for representative charting) during the 11

months following the abrogation of the price-fixing provisions of the license agreements in August, 1942.



C-O-Two Fire Equipment Co. C —·—·
American-La France and Foamite Industries, Inc. A — — —
Walter Kidde and Company, Inc. K ·····

For four and one-half years preceding the abrogation of the price-fixing provisions there was not one hour of one day during which the price of a *single* manufacturer for a *single* model varied by so much as a fraction of a cent.[2] *In contrast,* after *the price-fixing provisions were*

[2]Price chart attached to Reply Brief for Appellants. We again point out that this identity of price existed pursuant to a contractual arrangement the validity of which expressly had been approved at that time by the Supreme Court of the United States. See Reply Brief for Appellants, footnote 2, pp. 4-5.

abrogated, there was not one hour of one day in the entire 11-month period when the prices of all defendants were the **same** *on a* **single** *model.*

In the light of this showing we earnestly ask this court to reconsider its statements. It is difficult, we submit, to imagine what more dramatic demonstration of a complete break of a price-fixing agreement *could* be expected.

With this complete and undeniable break in the price-fixing pattern previously followed by the defendants under the pricing provisions of the license agreements, the conduct of the defendants over the succeeding years becomes entirely consistent with—and in fact affirmatively shows—a competitive pattern. Of course the price lists show that prices for these competitive products were the same during substantial periods of time. But it is uniformly recognized by the courts that identity of price for a standard product is to be expected in a competitive industry.[3]

And on the facts of this record the only reasonable conclusion is in accord with the sworn testimony of appellants, namely, that such identity of price as existed was the result of competition rather than collusion. In no single instance after August of 1942 were price changes simultaneous. On the contrary, in every instance the intervals of time elapsing between the date on which one manufacturer changed his prices and the dates on which the others met them were of such duration and diversity as to portray precisely the price pattern of a competitive industry, rather than one governed by conspiratorial behavior.[4] More, there is a complete lack of uniformity

[3]See authorities cited in Reply Brief for Appellants, pp. 7-8.
[4]See Reply Brief for Appellants, pp. 30-32.

in the pattern of price changes. In the price moves since the war the first manufacturer to increase prices in two instances was C-O-Two, in two other instances, Kidde. The second manufacturer to meet the increased price in one instance was American-La France, in two instances, C-O-Two, and in one instance, General Pacific. Kidde was the last to meet the price on one occasion, General Pacific on another, and American-La France on still another. And this demonstration becomes conclusive, we submit, when the pricing conduct after August, 1942, is compared with that shown by this record to have existed during the period when prices were the result of agreement.[5]

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2. BIDS TO PUBLIC AGENCIES.

The fact that on three occasions defendants quoted their list prices for relatively small quantities of fire extinguishers on bids called for by local governmental agencies in no way detracts from the foregoing record of price competition. This was brought out by the court and conceded by counsel for the Government at the oral argument (p. 67):

> "Judge Pope: I suppose if they used the list prices in each of those cases they were identical.
>
> Mr. Dixon: That is correct. The Government contends that that is the fact, and there isn't any evidence here to the contrary.
>
> Judge Pope: If, for instance, they did that, I presume we may assume that they quoted those identical prices to private manufacturers who wanted these products * * *. If that is conceded, there isn't

[5]See price chart, supra.

anything added to the case, is there, by the fact that when the City of Los Angeles wanted fire extinguishers, they likewise gave identical list prices, price quotations to the City?

Mr. Dixon: No, I believe, Judge Pope, the fact that identical bids were submitted to the City or the County of Los Angeles is entitled to no greater weight than if they were submitted to an individual manufacturer."

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3. NATIONAL DELIVERED PRICE.

In this case, for the first time in the history of the antitrust laws so far as our research discloses, a Federal court has held that where each of a number of competitors in an industry follows the practice of selling its products to all of its customers at the same price, this is "circumstantial evidence of the existence of a conspiracy" between those competitors to fix prices (p. 12):

> "Additional *circumstantial evidence of the existence of a conspiracy* as charged in the indictment is found in the fact that the corporate defendants charged identical consumer prices for their products regardless of where they may be sold in the United States."

This holding by a Federal court of appeals has such far-reaching implications as to warrant, we respectfully submit, this court's reconsideration. True, the court says (p. 13):

> "* * * uniformity of delivered price does not in and of itself create inference of collusion, where such uniformity has 'simple and local explanations in the nature of the market, the product and the transportation costs.' "

But the court immediately goes on to say (p. 13):

> "But appellants do not produce any such explanation here."

Can it be that this court intends to hold that the Government establishes a *prima facie* case of conspiracy by showing—without more—that each of a number of competitors charges its customers the same delivered price throughout the country? Certainly the decision will be cited for such a proposition and certainly such a decision will fall with devastating impact upon American business. It is common knowledge that tens of thousands of products are priced at a single national delivered price.[6] It is—we had thought—common knowledge that such a situation is entirely consistent with and characteristic of a competitive market. A "uniform delivered price at all points of delivery" has been expressly sanctioned by the Supreme Court of the United States, for the reason among others that it avoids possible conflict with the Robinson-Patman Act and like statutes dealing with discriminatory pricing:

> "But it does not follow that respondents * * * may not maintain a uniform delivered price at all points of delivery, for in that event there is no discrimination in price" (*Trade Comm'n v. Staley Co.* (1945) 324 U.S. 746, 757).

The citation of and quotation from *Milk and Ice Cream Can Institute v. Federal Trade Com'n* (7 Cir. 1946) 152 F.2d 478, 481, by this court (pp. 12-13) only adds breadth and serious significance to its decision. In the *Ice Cream*

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[6]See survey of the Federal Trade Commission referred to at p. 35 of Reply Brief for Appellants.

Can case the members of the industry, acting through an association, adopted a complex and artificial freight equalization plan under which identical prices for each member (regardless of where located) were computed for every delivery point throughout the country. Prices at different delivery points throughout the country, of course, were different. Under this plan the respondents billed the purchaser the f.o.b. plant price plus freight and credited the purchaser for the difference between the freight billed *and the freight from the plant of the competitor located nearest to such purchaser.* The credits were computed from freight rate books prepared by the association and distributed to members. Often these books were used only for the quotation of price, and in making the actual shipments and determining the routes the members referred to other traffic information. Daily reports were received with respect to the freight charged and equalized, and deviations from the plan were policed.[7]

It was as to this situation the court in that case said:

> "Just how such an unnatural situation could be brought about by members of an industry without a plan or agreement is difficult, if not impossible to visualize."

But this court now italicizes and applies this language to the simple practice of each of a number of competitors charging the same price to all of its customers throughout the country—a customary, accepted course of conduct by American business, involving no concurrence in artificial and complex formulae—and holds that following such a

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[7]See Reply Brief for Appellants, pp. 45-46, headings 1, 2 and 3.

practice is *"Additional circumstantial evidence of the existence of a conspiracy"* (p. 12).

We earnestly ask this court to reconsider this ruling.

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4. PRICE INCREASES AFTER THE WAR.

In its opinion, as an additional circumstance showing conspiracy, this court says (p. 13):

> "Instead, a survey of market conditions in the fire extinguisher industry immediately after the last war indicates that although there was a substantial surplus of such extinguishers on the market (put there by the government), the defendant corporations increased their prices. Price increases which occur in times of surplus or when the natural expectation would be a general market decline, must be viewed with suspicion. Yet appellants offer no evidence to dispel doubts as to the legitimacy of their activities."

Every line of the record supporting or bearing in any way upon this statement is on one page, reading as follows (R. 176):

> "The Witness [Mr. Allen]: * * *
>
> Now, we had to get our prices up and I know what applied to us applied to other manufacturers as well.
>
> We had to get our prices up with the lowering of our volume and having to give increased compensation to our different dealers.
>
> We were very, very happy to be able to get our prices up a little bit because we couldn't have existed on the prices that we had during the war.

Q. (By Mr. Lord): There was an unusual condition at the end of the war, was there not, war surplus?

A. Yes, Mr. Lord. As probably everybody knows the Government dumped tremendous quantities of our extinguishers on the market as surplus.

The Court: But that didn't prevent your prices from going up?

The Witness: No, it couldn't. We had to put them up. Their prices are still lower than ours—the surplus material is still being sold at a lower price than we sell it for. You can see them advertised in the Los Angeles papers here every Sunday. A 15-pound extinguisher will sell for $25.00 or $26.00 or $27.00 which is actually, probably, lower than our cost if we put our overhead in it."

In all fairness we ask this court realistically to review this record and to reconsider whether the evidence warrants a finding that the postwar increase in prices by defendants "must be viewed with suspicion" because made "in times of surplus or when the natural expectation would be a general market decline" (p. 13).

During the war years prices of fire extinguishers were at their lowest point, because, as Mr. Allen testified, manufacturing volume was at a peak and sales costs were eliminated by direct sales to the Government (R. 175). After the war, volume dropped and the sales costs incident to civilian distribution were reimposed. It was because of "the lowering of our volume and having to give increased compensation to our different dealers" (R. 176) that it was necessary for C-O-Two to increase its prices.

In addition, as this court judicially knows, costs of labor and materials sharply increased. Fifteen-pound fire extinguishers were sold to the Government during the war, in tremendous quantity lots, at $34.35 each, as compared with a pre-war price of $49 each.[8] Surplus extinguishers dumped on the market by the Government sold for as low as $25 to $27 each—prices below C-O-Two's actual cost of manufacture (R. 176).

It is, we submit, a matter of common knowledge that many war surplus materials were handled and stored under most adverse conditions; that their sales are not accompanied with the customary warranties and service guarantees of manufacturers for new products; that they do not sell at competitive prices with new products. We ask this court to recognize and hold that the conduct of appellants in increasing their prices to meet increased costs in the situation above disclosed may reasonably be considered that of honest businessmen, acting in a competitive market and not pursuant to conspiratorial conduct.

In this regard we point out that because of C-O-Two's increased costs it raised its prices in October, 1945. It was not until January, 1946, *three months later,* that any other manufacturer raised its prices.[9] What stronger evidence could be presented of a company acting individually under the force of economic circumstances and without agreement or criminal conspiracy with its competitors.

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[8]See R. 175 and price chart attached to Reply Brief for Appellants.

[9]See price chart, Reply Brief for Appellants.

5. C-O-TWO'S COST RECORDS.

In its opinion this court says (p. 5):

> "It is significant that the trial court also found that appellant C-O-Two had no cost records or other data indicating the manner or method of computing the sale price of the fire extinguishers manufactured and sold by it."

Most respectfully we refer the court to the statement in note 17 on pages 22 to 24 of Reply Brief for Appellants for a quotation of the record on this point and our comment thereon.

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6. STANDARDIZATION OF PRODUCT.

The fact is undisputed that extinguishers of the same size manufactured by each of the defendants are virtually identical in appearance. But mere similarity in product cannot be a "plus factor" (i.e., a circumstance from which an inference of conspiracy *to fix prices for the product* can be drawn), in the absence of a showing—completely lacking here—that the standardization is artificial.[10]

Of course, certain products, such as clothing and jewelry, are manufactured to appeal to individual tastes. Of course, differences in color and design of such objects normally will be expected. But other products—in most cases strictly functional in nature—normally are expected to be similar in appearance, and such similarity will have not the slightest tendency to show conspiracy. It would not be supposed, we submit, that because shovels or rakes

[10]See Reply Brief for Appellants, p. 11, et seq.

or hoes or paint brushes or brooms are indistinguishable except for manufacturers' labels, an inference arises that standardization pursuant to a price-fixing conspiracy has occurred.

This is exactly the situation here. Extinguishers are industrial tools, functional in nature, manufactured in an assembly-line manner to meet a common industrial need. As was said at the oral argument (Tr. pp. 70-71):

> "Judge Pope: I suppose there is no reason why a manufacturer of this kind of product would be interested in getting out an attractive looking extinguisher.
>
> Mr. Dixon: No, I do not think there would be particularly, Judge. I suppose an extinguisher would do the job just as well if it were painted green or some other decorative color, but the fact is whether that would have some sales appeal to some people because it was painted a different color or not, I do not know."

While there is nothing in the record so stating, both counsel for the Government[11] and the court in its opinion (p. 7) refer to the fact that the extinguishers of all defendants are the same color. Undoubtedly the court spoke from common knowledge that these extinguishers are red. The Government's argument, above quoted, suggests that certain manufacturers, if there had not been a conspiracy, might have painted their extinguishers some other color to test its sales appeal. We believe it is less reasonable to conclude that fire extinguishers are painted red by all manufacturers pursuant to a conspiracy, than

[11]Transcript of oral argument, p. 54.

it is to conclude that, without any conspiracy at all, they are painted red like fire engines to associate them with their intended use and to make them prominently observable in the event of fire emergency. We do not believe that it would be reasonable for one manufacturer to paint them green, for example, when employees in industrial plants have a natural mental association between the color red and fire extinguishers.

The horn, also mentioned by the Government,[12] is placed on each extinguisher because of its essential function in fire extinction. We urge the court again to refer to *Randolph Laboratories v. Specialties Development Corp.* (D. N.J. 1949) 82 F.Supp. 316 (affirmed, 178 F.2d 477), for a clear and convincing statement of this function.

The significant fact in this case is not whether these ordinary industrial tools are similar, but whether the record admits of an inference of collusive action from the conduct of the parties in manufacturing and introducing new models. New models obviously are brought on the market for competitive reasons—to appeal to a different group of purchasers or to the same group for different needs. The record is uncontradicted that in not one single instance in the history of this industry was a new model introduced simultaneously; that, on the contrary, the shortest period of time which elapsed between the introduction of a new model by one of the defendants and the date on which a competitor introduced that model was six months.[13]

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[12]Transcript of argument, p. 54.

[13]See Reply Brief for Appellants, pp. 15-17, and model chart attached to brief.

Surely, we submit, from such a competitive pattern the only reasonable inference is not conspiracy but the absence thereof.

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7. DEFENDANTS WERE MEMBERS OF THE FIRE EXTINGUISHER MANUFACTURERS ASSOCIATION, INC., AND WERE REPRESENTED ON THE CARBON DIOXIDE COMMITTEE OF THAT ASSOCIATION.

We venture to say that every major industry in the United States has a trade association. The legality of such associations *per se* has never been questioned. Businessmen—counsel for businessmen—are now faced with a decision stating that mere membership in a trade association is a "plus factor" in finding a criminal conspiracy—*mere membership,* without proof by the Government of a single activity of the association. This goes beyond any recorded decision. More, businessmen will now read that it "cannot be denied" that meetings of the association will be viewed by the Government and may be viewed by a court as providing an "opportunity * * * to discuss and agree upon prices and pricing policies on an industry-wide basis."

We submit that unless a presumption of guilt is to replace the presumption of innocence the fact of membership in the association and attendance at its meetings can raise *no* inference, be *no* "plus factor," that defendants were engaged in a price-fixing conspiracy. On the contrary the fact that the Government with its broad powers of subpoena failed to find and introduce into evidence a single activity of the association which might be

criticized adds strongest credence to the sworn statements of appellants that at no time did they discuss or agree upon prices with their competitors.

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8. SUGGESTED RESALE PRICES.

Here, again, the only evidence in the record is that each manufacturer suggested resale prices. And so do all businessmen wear shoes. Suggesting resale prices is an ordinary, lawful accompaniment to the sales of thousands upon thousands of products by American businessmen in all branches of trade.[14] Indisputably, each of the defendant manufacturers had an understandable, reasonable economic interest in following this practice. The fact that each of them did so, we submit, does not even reasonably, let alone irresistibly, lead to the conclusion that they *agreed* to do so.

We read the court's opinion at page 8 as a holding that the stipulation quoted at pages 7-8 supports a finding by the trial court that the defendants required their dealers to maintain resale prices agreed upon by the defendants as a group.[15] Most respectfully we submit that, if this be the court's holding, it cannot be sustained. The stipulation contains nothing bearing upon an agreement among the defendants except the admitted fact that each followed the practice of suggesting resale prices. And so

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[14]Reply Brief for Appellants, footnote 20, p. 26; Transcript of Argument, p. 40, et seq., p. 58.

[15]Finding 23, R. 44.

far as it bears upon the conduct of each defendant, acting individually, it does not support, but on the contrary negatives, a finding that on any occasion any defendant required its dealers to maintain resale prices.[16] The stipulation states that each of the dealers would testify that "*he* understood" that his manufacturer required its products to be sold at the published prices. But it does not state that the manufacturer required such resale prices or agreed with any dealer upon resale prices. Since this vital link in the chain of evidence was omitted from the stipulation (i.e., since the Government in effect stipulated that no dealer would so testify), and since the Government failed to supply this link by proof at the trial, the situation is like the one mentioned by Judge Bone at the argument in referring to the *Karn* case (p. 7, Transcript of Argument):

> "Judge Bone: You could not possibly convict that fellow; that is, you could if you took one car out of the center of the train, you could say you would have two trains instead of one."

And this point is made doubly clear by the fact that the stipulation characterizes the published prices as "suggested" prices, a term of well-known legal and factual significance (*not* "agreed upon" prices), and by the further fact that the stipulation states that the dealers "generally" followed these "suggested" prices "as a matter of sales policy" (p. 8):

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[16]The additional evidence as to resale price maintenance referred to in the next subdivision of this petition relates to C-O-Two alone *and to no other manufacturer.*

"* * * that in reselling such fire extinguishers to consumers and users in the Southern California area, he or the corporation by which he was employed, as a matter of sales policy, generally adhered to the published consumer prices suggested by the defendant corporation whose product was being sold; * * *."

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9. THE EVIDENCE AS TO C-O-TWO AND ITS DEALERS.

It is only natural that this court should place much emphasis upon the two occasions when C-O-Two admonished its dealers in connection with off-list pricing on bids to governmental agencies. We have no protest in this regard. But earnestly we ask the court to realize that this very fact emphasizes what is so important to bear in mind in this case. The indictment here charges a price-fixing agreement—not between C-O-Two and its dealers, but between C-O-Two, Kidde, American-La France and General Pacific.

The above testimony as to C-O-Two has no relevancy to the conspiracy charged *unless that conspiracy be otherwise established* and the acts of C-O-Two be held overt acts pursuant thereto. As we have said,[17] not a word in the record connects C-O-Two's actions with any other defendant, by agreement, participation or even knowledge. The record shows that the Government preceded this trial with extensive investigation under broad subpoenas (R. 109-110). It must be presumed that if it had found any evidence even remotely connecting any defendant with any "policing" activities of any other defendant,

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[17]Reply Brief for Appellants, p. 25.

or even showing any "policing" activities undertaken independently by any defendant other than C-O-Two, it would have introduced such evidence. Instead the record is bare.

For the purpose of appraising whether this testimony tends to prove the conspiracy charged, it must be viewed not only from the standpoint of C-O-Two but from that of each of the other manufacturers. Most respectfully we urge that when so viewed—objectively—it has no tendency to support a finding of conspiracy among the manufacturing defendants and their officers.

We read the argument of counsel for the Government as recognizing this—as recognizing that to sustain the broad conspiracy charged recourse must be had to other circumstances.[18] We submit that this is so, and that, as we have shown, the other circumstances—whether considered singly or collectively—do not spell out the "irresist-

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[18] "MR. DIXON: * * * But there again you may have that in this case. If you want to isolate it, certainly you have that as to the C-O-Two dealers here that were policed, but that isn't the charge made in this indictment, that just C-O-Two is doing it.

Besides the charge here is that you have a horizontal price fix, and I urge Your Honors, if you have not already done so, to read the specifications of the conspiracy as charged in this indictment, and certainly the charge is—and no demurrer or motion to dismiss was made, and I do not think it would apply, but Paragraph 5, for example,—Paragraph 12(f) of the indictment charges as one of the things that defendants agreed to do was to agree to quote and submit identical bids when bids were called for by public and governmental agencies in the Southern California area in accordance with the prices fixed for sales of fire extinguishers and to require any dealer submitting bids in competition with any of the defendant manufacturers to do likewise.

Mr. Kirkham says, 'There is no evidence here that anybody else, other than the C-O-Two dealers, were policed.' Of course not. The only time you have policing, Your Honor, is when they step out

ible conclusion'' that the ''charges of the indictment were true beyond a reasonable doubt'' (p. 6).

CONCLUSION.

So far as our research discloses in no other antitrust case, criminal or civil, has the Government relied upon proof which is so lacking in probative force as in this case. We repeat that we do not complain of the fact that the evidence is circumstantial nor that the circumstances are not considered piecemeal instead of as a whole. But we do submit that these circumstances cannot reasonably be added together to sustain a finding of conspiracy, since each of them considered alone is consistent with innocence *and* all of them considered together are consistent with each other and reasonably can co-exist in a state of innocence.

We respectfully refer the court to the many representative cases we reviewed in our brief[19] where a finding of conspiracy was sustained on circumstantial evidence.

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of line and the evidence here shows none of the other dealers stepped out of line on these bids. Why should they be policed?

JUDGE BONE: You think that creates an inference that justifies a conviction in a criminal case. That must be your case.

MR. DIXON: That is one of the factors, Your Honor.

JUDGE BONE: That is one of the plus factors in the case.

MR. DIXON: That is right. There are many other things here. We have specified and outlined them in our brief. In other words, there is what we call a background here. That standing alone does not convict anybody, and I do not mean to tell this Court that if that is all there was here there never would have been any indictment, but there are several other things that I would like to mention in passing, and this is in the stipulation again'' (Tr. of Oral Argument, pp. 60-61).

[19]Reply Brief for Appellants, pp. 39-54.

In each it will be seen that, unlike the instant case, all the circumstances relied upon could not reasonably be expected to co-exist in the absence of the conspiracy charged.

We know of no better way to test the validity of what we have said than to look at the actual business situation now confronting these defendants in respect of those practices which this court has held are circumstantial evidence of crime.

It is true C-O-Two can abstain from ever admonishing a dealer. But, as pointed out above, this does not even touch the heart of the conspiracy alleged or the circumstances which have been found to evidence it.

Must one or more defendants now charge different prices than its competitors, and, if so, how long will the defendant charging the highest price remain in business? And how can any company prevent a competitor from meeting its prices?

Must one or more of the defendants abandon its practice of charging the same price to all of its customers throughout the country? If so, it still must charge a price competitive with whatever price other manufacturers are charging or lose its business.

Must each defendant resign from the trade association or at least never attend a meeting?

Must each now devise some method to change the shape or style of its products so as to make them differ from those of its competitors? The horn, an essential functional part, cannot be eliminated. Is it reasonable to ask any one to abandon the red color?

In sum, must defendants artificially and consciously be different to escape the "irresistible inference" that their normal similarities are criminal?

We concur in the repeated statements of the courts that the Sherman Act expresses a policy vital to our democratic institutions. We believe it to be a policy endorsed by the overwhelming majority of American businessmen. But the fair objectives of this policy cannot, we respectfully submit, be achieved unless the same scrupulous regard be given to sustaining the fair and normal conduct of businessmen as is given to the condemnation of practices which do not meet that test.

For the reasons above stated we respectfully ask for a rehearing.

Dated, San Francisco, California,
June 27, 1952.

Respectfully submitted,
Francis R. Kirkham,
William E. Mussman,
Richard J. MacLaury,
Attorneys for Appellants and Petitioners.

Pillsbury, Madison & Sutro,
Of Counsel.

Certificate of Counsel.

I hereby certify that I am of counsel for appellants and petitioners in the above-entitled cause and that in my judgment the foregoing petition for a rehearing is well founded in point of law as well as in fact and that said petition for a rehearing is not interposed for delay.

Dated, San Francisco, California,
June 27, 1952.

Francis R. Kirkham,
Of Counsel for Appellants and Petitioners.